No. 88-192

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

MCKESSON CORPORATION,
Petitioner,

vs.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

AMICUS CURIAE BRIEF ON REARGUMENT OF THE STATES OF CALIFORNIA, IDAHO, MONTANA, NORTH DAKOTA, TEXAS, UTAH, ARIZONA, HAWAII, MINNESOTA AND THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENTS

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INTRODUCTION

On July 3, 1989, the Court restored this case to the calendar for reargument and directed the parties to brief and argue the following questions:

1. When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?

2. May a State, consistently with the Due Process Clause of the 14th Amendment, remedy the effects of a tax found to

discriminate against an interstate business in violation of the Dormant Commerce Clause by retroactively raising the taxes of those who benefited from the discrimination?

On February 21, 1989, the brief of amici curiae California, Idaho, Montana, North Dakota, Texas and Utah was filed in this case. While that brief addressed some of the questions now raised by the Court in its order restoring the case to calendar, amici respectfully submit this brief on reargument, in support of respondent, to address further the Court's two questions. The following States join California in this brief: Idaho, Montana, North Dakota, Texas, Utah, Arizona, Hawaii, Minnesota and the District of Columbia.

SUMMARY OF ARGUMENT

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) this Court established a three-pronged test for governing consideration of whether to impose a civil decision prospectively or retroactively. The first question by the Court assumes a state tax statute violates clearly established law, thus not satisfying the first factor of *Chevron*. However, no individual factor is automatically controlling and all three *Chevron* factors must be considered to determine whether retrospective relief must be provided by a State. Where a consideration of the second and third factors of *Chevron* leads to the conclusion that retrospective relief is not appropriate, the State may elect to provide only prospective relief.

The second question presupposes that a tax is found to be unconstitutionally discriminatory. Such discrimination may be remedied by retroactively taxing those who benefited from the discrimination. The mandate of equal treatment enunciated in *Davis v. Michigan*, ___ U.S. ___, 103 L.Ed.2d 891 (1989) is satisfied if this retroactive taxation reaches back a reasonable time, certainly no greater than the time under State law when a taxpayer may file an amended state tax return and when the State may notify a taxpayer of additional proposed tax due.

ARGUMENT

I

THE *CHEVRON* STANDARD WHICH CONTROLS THESE CASES ALLOWS A STATE TO ELECT TO PROVIDE ONLY PROSPECTIVE RELIEF WHEN A TAXPAYER PAYS UNDER PROTEST A STATE TAX FOUND TO VIOLATE CLEARLY ESTABLISHED LAW UNDER THE COMMERCE CLAUSE

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), this Court established a three-pronged test for governing consideration of whether to impose a civil decision prospectively or retroactively. Amici believe the *Chevron* standard is still valid and should be applied to this case.

As the first factor is stated in *Chevron*, "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied [citation omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed [citation omitted]." 404 U.S. at 106. The first question currently posed by the Court assumes a State tax statute violates clearly established law, thus not satisfying the first factor of *Chevron*. The question then asks whether in these circumstances the State "must" provide some form of retrospective relief. Amici respond that the answer to this question is "no", and that simply addressing individually the first factor of *Chevron* does not resolve the retroactive/prospective issue. Instead, all three factors must be considered prior to determining whether retrospective relief must be provided by a State. Accordingly, in those cases where a consideration of the second and third factors of *Chevron* leads to the conclusion that retrospective relief is not appropriate, a State may elect to provide only prospective relief.

Amici's argument on this point is set forth fully at pages six through nine of its amici curiae brief filed on February 21, 1989, in this matter. For the convenience of the Court, that argument will be repeated here in substantially the same form.

The First *Chevron* Factor, That of Whether a New Principle of Law is Established, is Not a Threshold For Prospective Application

Amici urge the Court to interpret and clarify the *Chevron* test so as to require an examination and balancing of all three factors. The Court has never held that the first factor of *Chevron* is a threshold requirement for prospectivity. In both *Chevron* and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982), the Court found all three *Chevron* factors militated against retroactivity and thus did not specifically address the issue of what weight is to be given to any particular factor.[1]

Amici urge the Court to adopt the view expressed by several Circuits that no single factor, including the first prong of *Chevron*, is determinative on the retroactivity question. That view was succinctly summarized in *Jones v. Consolidated Freightways Corp.* 776 F.2d 1458 (10th Cir. 1985), where the Tenth Circuit explained the application of the *Chevron* standard as follows:

[1] Justice Stewart, author of the *Chevron* opinion, did state the issue of retroactivity "is not even presented unless the decision in question marks a sharp break in the web of the law" and "the issue is presented only when the decision overrules clear past precedent." *Milton v. Wainwright*, 407 U.S. 371, 381 n. 2 (1972) (Stewart, J., dissenting). However, *Milton* was a criminal (not civil) case, the majority did not address the retroactivity issue, and Justice Stewart did not even cite to *Chevron* in his dissent. Also, in *United States v. Johnson*, 457 U.S. 537, 550 n. 12 (1982), Justice Blackmun stated in a footnote that in the civil context, the "clear break" principle has usually been stated as the threshold test for determining whether or not a decision should be applied nonretroactively. However, once again, the statement was made in the context of a criminal (not civil) case. It should be noted that the use of the term "must" in the *Chevron* statement of the first factor is balanced by the use of the word "must" in the second factor, which indicates that " 'we *must* . . . weigh the merits and demerits *in each case*' " in determining whether retrospective application will further or retard the operation of the rule in question. 404 U.S. at 106-107 (emphasis added). If the first factor were a threshold test, the second factor would not result in a weighing "in each case."

> "A proper assessment under *Chevron Oil* focuses upon the relative significance of the individual *Chevron* factors. It is not necessary that each factor compel prospective application. [Citations omitted.] While non-retroactivity generally depends upon the existence of past precedent, [citation omitted] 'the final determination involves pulling together the three factors for a careful balancing.' [Citation omitted.]" 776 F.2d at 1460-1461.

Jones is consistent with the language of *Chevron* where the Court specifically stated that in cases dealing with the nonretroactivity question, it has "generally *considered three* separate factors," and concluded that "upon *consideration of each* of these factors" that prospective application was proper. *Chevron*, 404 U.S. at 106-107, emphasis added. Petitioner would interpret this language to mean that only where the first prong is satisfied would an examination under the second and third factors take place. Such an interpretation, however, is in direct conflict with the plain language of *Chevron* which speaks of considering not one, *but three*, factors. To interpret *Chevron* as petitioner does would nullify the need for a three-factor test and would relegate the important considerations of purpose and inequity, the second and third *Chevron* factors, to second class status, to be examined only if and when the Court has found under the first prong of *Chevron* that a new principle of law has been established.

Amici urge the Court not only to reject the "threshold" approach suggested by petitioner, but also to recognize that after considering and balancing all three factors, *non*retroactivity may be supported by a finding under *only one* of the three *Chevron* factors. Such an approach was followed by the First Circuit in *Fernandez v. Chardon*, 681 F.2d 42 (1st Cir. 1982), affirmed on other grounds, 462 U.S. 650 (1983), where the court found neither the first nor the second *Chevron* factors required nonretroactive application of the decision in issue. The court in *Fernandez* then stated "[w]e might *still* find retroactivity barred if it would produce substantially inequitable results, the third *Chevron Oil* factor." 681 F.2d at 52 (emphasis added). Similarly, the Tenth Circuit in *Jones v. Consolidated Freightways Corp., supra*, 776 F.2d at 1460 remarked, "[a] proper assessment under *Chevron*

Oil focuses upon the relative significance of the individual *Chevron* factors. It is not necessary that each factor compel prospective application."[2]

The Eleventh Circuit reached the same conclusion in *Ackinclose v. Palm Beach County, Fla.*, 845 F.2d 931 (11th Cir. 1988), where the court stated, at page 935, "[i]n the final component of the *Chevron* analysis we are instructed that if retroactive application of a decision of the Court would produce substantial inequitable results, a holding of non-retroactivity is implied.[3]

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[2] Citing to *Mitchell v. City of Sapulpa*, 857 F.2d 713, 716 (10th Cir. 1988), petitioner McKesson states the Tenth Circuit is one of the federal Circuits which has "expressly viewed *Chevron's* first prong as a threshold test that must be met before the presumption of retroactivity can be overcome." McKesson Brief at 34, n. 9. Amici disagree with this statement. Page 716 of *Mitchell*, which is cited to by petitioner, discusses the applicability of the *Johnson* standard for retroactivity in criminal cases. The court at page 717 of *Mitchell* then concludes the *Chevron* (not *Johnson*) standard is to be applied, and goes on to examine each of the three *Chevron* factors. Nowhere in *Mitchell* does the Tenth Circuit state that the first prong of *Chevron* is a threshold test, and such a reading of *Mitchell* is consistent with *Jones*. While the Tenth Circuit in *Jones* did comment that nonretroactivity "generally" depends upon the existence of clear past precedent, *Jones* explicitly states the final determination involved "pulling together the three factors for a careful balancing," and explicitly states that it is not necessary for each factor to compel prospective application. 776 F.2d at 1460-1461.

[3] Citing to *Acoff v. Abston*, 762 F.2d 1543, 1548, n. 6 (11th Cir. 1985), Petitioner McKesson stated the Eleventh Circuit is one of the Federal Circuits which has "expressly viewed *Chevron's* first prong as a threshold test that must be met before the presumption of retroactivity can be overcome." McKesson Brief at 34, n. 9. Amici dispute this statement. The footnote reference in *Acoff* clearly states the court is applying the *Johnson*, not *Chevron*, standard, so any reference in *Acoff* to how the *Chevron* standard should be applied is dicta. That dicta is clearly inconsistent with the subsequent opinion of the Eleventh Circuit in *Ackinclose* which states that all three *Chevron* factors are relevant, and that it is "implied" from *Chevron* that a holding of nonretroactivity can be based solely upon a finding under the third prong of *Chevron* that

This approach followed by the First Circuit in *Fernandez*, the Tenth Circuit in *Jones*, and the Eleventh Circuit in *Ackinclose* not only rejects the first prong of *Chevron* as a "threshold" test, but also recognizes, consistent with *Chevron*, that the prospectivity question requires an analysis of all three factors. Under this approach, which amici urge the Court to adopt, prospective application may be found proper upon a finding of a single *Chevron* factor. Thus, a State may elect to provide only prospective relief where a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause.

II

A STATE MAY, IN PRINCIPLE, CONSISTENTLY WITH THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT, REMEDY THE EFFECTS OF A TAX FOUND TO DISCRIMINATE AGAINST AN INTERSTATE BUSINESS IN VIOLATION OF THE DORMANT COMMERCE CLAUSE BY RETROACTIVELY RAISING THE TAXES OF THOSE WHO BENEFITED FROM THE DISCRIMINATION

The Court, on the several occasions where this issue has been addressed, has clearly recognized that consistent with due process limitations, retroactive taxation is permitted. *Cooper v. United States*, 280 U.S. 409, 411-412 (1930); *Milliken v. United States*, 283 U.S. 15, 21 (1931); *United States v. Hudson*, 299 U.S. 498, 500-501 (1937); *Welch v. Henry*, 305 U.S. 134, 147 (1938); *United States v. Darusmont*, 449 U.S. 292, 296-298 (1981); *United States v. Hemme*, 476 U.S. 558, 568-569 (1986). Indeed, it is well settled that "a tax is not necessarily unconstitutional because retroactive." *Welch v. Henry*, 305 U.S. at 146. Following the approach most recently taken in *Hemme*, the Court must "consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limita-

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retroactive application would produce substantial inequitable results. *Ackinclose*, 845 F.2d at 935.

tion." 476 U.S. at 568-569, quoting from *Welch v. Henry*, 305 U.S. 134, 147.

Petitioner McKesson recognizes that some retrospective effect is not necessarily fatal to a revenue law under the due process clause. However, McKesson frames the outside parameters of the states' retrospective powers as being inextricably bound to the mere passage of time, and concludes that only where a state acts "promptly" does it have the option of remedying discrimination by retroactively equalizing the tax burden. (Brief for Petitioner McKesson on Reargument p. 24-25.) Petitioner concludes the time has now passed for Florida to impose a remedial retroactive tax since the retroactive statute would have to reach back and tax transactions that occured five years ago. (Brief for Petitioner on Reargument p. 28.)

Petitioner errs in analyzing the propriety of retroactive application as turning solely on the temporal issue. Certainly the issue is an important one, and the cases which have examined the retrospective issue have not ignored the issue of timing. E.g., *United States v. Darusmont*, 449 U.S. at 296-297 ("short and limited periods"); *United States v. Hudson*, 299 U.S. at 501 (35-day period "not unreasonable"); *Welch v. Henry*, 305 U.S. at 147-148 (two-year retroactivity period reasonable). But timing is merely one of the "circumstances" to be considered under *Hemme*, 476 U.S. at 568, and certainly should not be considered the controlling factor. Moreover, the timing issue under the due process analysis should not be decided by looking to the time frame necessary for the state to remove and equalize *all* the tax burden. Equalizing all the tax burden is not constitutionally required, as recently illustrated by *Davis v. Michigan Dep't of Treasury*, ___ U.S. ___, 103 L.Ed.2d 891 (1989).

The Court in *Davis* held invalid a Michigan statute exempting from income taxation all retirement benefits paid by the State or its political subdivisions, but levying an income tax on retirement benefits paid by all other employers, including the Federal Government. Relying upon *Heckler v. Mathews*, 465 U.S. 728, 740 (1984), the Court in *Davis* stated that the Constitution does not require such a drastic solution as the invalidation of Michigan's income tax law in its entirety, and stated that "[w]e have

recognized, in cases involving invalid classifications in the distribution of government benefits, that the appropriate remedy 'is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.'" *Id.* ___ U.S. at ___, 103 L.Ed.2d at 906, citations omitted, emphasis in original. The Court further stated that Davis' claim "could be resolved either by extending the tax exemption to retired federal employees (or to all retired employees), or by eliminating the exemption for retired state and local government employees." ___ U.S. at ___, 103 L.Ed.2d at 907.

The significance of *Davis* is that both the referenced standard of a "mandate of equal treatment" by the withdrawal of benefits from the favored class, and the proposed resolution of Davis' complaint by eliminating the exemption for retired state and local government employees, speak in terms of requiring only present, not retroactive, state action. Thus, *Davis* impliedly stands for the proposition that in tax cases, a due process violation may be cured by removing something less than *all* benefits received at *all* times by *all* members of the favored class. This proposition is consistent with the Court's longstanding recognition that the wrongs to victims of a discriminatory government program may be remedied by ending preferential treatment for others, a remedy which recognizes it is neither constitutionally required nor feasible to require fully retroactive removal of the preferential treatment from the benefited class. See *Heckler v. Mathews, supra*, 465 U.S. 728, 740; *Gilmore v. City of Montgomery*, 417 U.S. 556, 566-567; *Norwood v. Harrison*, 413 U.S. 455, 470-471 (1973).

Because the removal of all the benefits from the preferred class is not required in order to satisfy due process, petitioner errs in automatically concluding Florida must reach back to the effective date of the Revised Florida Products Exemption statute which petitioner challenges in this action in order to retroactively equalize the taxes on interstate and local products. Nothing in either *Davis* or *Heckler*, or the cases cited therein, requires that a "mandate of equal treatment" is *only* achieved when 100% of the benefits are withdrawn from 100% of the favored class during the entire life of the statute.

It should not be necessary for Florida to reach back five years to provide a mandate of equal treatment, solely on the theory a State must reach back and ameliorate all benefits conferred since the date an unconstitutional statute became effective. Both due process and the Commerce Clause should be satisfied with a "mandate of equal treatment" reaching back a reasonable time. This "reasonable time" standard is not a "bright-line" test and provides no firm quidelines. In most cases, however, a reasonable time presumptively should be no greater, and often less, than the statute of limitations under State law which controls when a taxpayer may file an amended state tax return and when the State may notify a taxpayer of additional proposed tax due. Such State statutes of limitations have been accorded deference by the Court in other contexts, and should be accorded deference in this setting as well.

Statutes of limitations "find their justification in necessity rather than in logic", and are practical and pragmatic devices to spare the courts from litigation of stale claims, and citizens from being put to their defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). They are not simply technicalities, but "have long been respected as fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). It is also well settled that "[a] constitutional claim can become time barred just as any other claim can." *Block v. North Dakota*, 461 U.S. 273, 292 (1983). Statutes of limitations are best left to legislative determination and control and, normally, therefore, States are free to set periods of limitation without fear of violating some provision of the Constitution. *Mills v. Habluetzel*, 456 U.S. 91, 101 n. 9 (1982).

This reasonable time standard, which is based upon the State statute of limitations as a presumptive *maximum* time, balances the interests of a taxpayer aggrieved under the Commerce Clause to receive a mandate of equal treatment; the interests under the Due Process Clause of those who benefited from discrimination and will be subjected to retroactive raises in taxes by the State; and the fiscal interests of the State, which is always a critical

inquiry in any retroactivity analysis. See *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 722 (1978); *Florida v. Long*, 487 U.S. ____ (1988) 108 S.Ct. 2354, 2361-2363; *Camden I. Condominium Assn. Inc. v. Dunkle*, 805 F.2d 1532, 1535 (11th Cir. 1986), cert. den. 107 S.Ct. 3266 (1987). Applying this standard to this case, any Commerce Clause injury to petitioner arising under the Florida statute can be cured, at the election of the State and consistent with due process, not only by a refund to petitioner, but alternatively also by the withdrawal by Florida of benefits from the favored class by retroactive taxation covering a reasonable period of time, not to exceed the time in which Florida can propose for past years additional deficiency assessments under the Florida statute of limitations.

CONCLUSION

For the reasons stated, this Court should affirm the validity of *Chevron*, reject the argument that the first prong of *Chevron* is a threshold for prospectivity, and hold that removal of benefits from a favored class for a reasonable retrospective period of time is a sufficient alternative remedy which is consistent with the Due Process Clause of the 14th Amendment.

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